



May 8, 2002

Mr. Paul Sarahan
Director
Litigation Division
Texas Natural Resource Conservation Committee
P.O. Box 13087
Austin, Texas 78711-3087

OR2002-2446

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161742.

The Texas Natural Resource Conservation Committee ("TNRCC") received a request for access to "all information collected, assembled, or maintained by [TNRCC] relating to McNabb Flying Service." You inform us that TNRCC has made available to the requestor the portion of the information that it believes to be public but claim that other requested information is excepted from disclosure under sections 552.107, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted "representative sample."¹

We begin by addressing your contention that documents contained in Attachment E are audit working papers that are excepted from disclosure by section 552.116 of the Government Code. Section 552.116 provides as follows:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003,

¹ We assume that the submitted "representative sample" of records is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Education Code, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

A governmental body that invokes section 552.116 must demonstrate that the audit working papers are from an audit authorized or required by statute by identifying the applicable statute. Here, you have not identified the applicable statute, if any. Thus, you have not demonstrated that the requested information was prepared or maintained by the state auditor or the auditor of a state agency in conducting an audit authorized or required by a statute of this state or the United States. *See* Gov't Code §§ 552.116(a), (b)(1), (b)(2). Therefore, no part of Attachment E may be withheld under section 552.116 of the Government Code.

You contend, however, that Attachments E and D are excepted from disclosure by section 552.111 and that Attachment C is excepted under sections 552.107 and 552.111 because the attachments consist of attorney-client communications, attorney work product, or intra-agency memoranda.

Section 552.107(1) excepts information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]" Section 552.107(1) protects an attorney's communication of legal advice or opinion to the client and communications from a client to an attorney where those communications are made in confidence and in furtherance of the attorney rendering professional legal service to the governmental body. Open Records Decision No. 574 at 5 (1990).

You inform us that Attachment C contains communications between TNRCC staff members and certain identified attorneys regarding the attorneys' representation of TNRCC in this matter. Having considered your representations and reviewed the information, we agree that the attorney-client communications in Attachment C may be withheld under section 552.107.

You also assert that some of the information in Attachment C as well as in Attachments D and E is excepted from disclosure because it is attorney work product. Section 552.111 of the Government Code excepts attorney work product if a governmental body demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *Id.* at 4. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions, and legal theories.

Although you have supplied information indicating that litigation is anticipated, you have neither indicated which documents were prepared in anticipation of litigation nor explained how any particular document tends to reveal the attorneys' mental processes, conclusions, or legal theories. Accordingly, you may not withhold any of the submitted information as attorney work product under section 552.111 of the Government Code.

You also claim that portions of Attachments C, D, and E implicate TNRCC's policymaking functions. Section 552.111 also excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section encompasses the deliberative process privilege. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The deliberative process privilege incorporated by section 552.111 protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. *See id.*; Open Records Decision No. 615 at 5 (1993). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. A genuine preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). However, when severable factual information appears in the draft of a policymaking document intended for release but does not appear in the final version, the severable information is not excepted by section 552.111. *Id.* As section 552.111 generally protects only advice, opinion, and recommendations, any protection under section 552.111

will usually be no greater or less than the protection offered under section 552.107. *See* Open Records Decision No. 574 at 2 (1990).

You indicate that Attachments C, D, and E contain communications among TNRCC staff members as well as between staff and attorneys regarding agency policymaking. We have reviewed the attachments and agree that some of the submitted information involves internal agency policy deliberations and is excepted from disclosure under section 552.111. You may therefore withhold the remainder of Attachment C as well as the information that we have marked in Attachments D and E under section 552.111. However, Attachment D contains some intra-agency communications that appear purely factual in nature while Attachment E contains documents that appear to be either intra-agency factual communications or were communicated to third parties. Since you have not described the context in which these documents were created or otherwise provided any explanation of how they reflect agency policy deliberations, we have no basis for finding the remaining information in Attachments D and E to be protected by section 552.111. *See* Govt Code 552.301(e)(1)(A) (governmental body seeking to withhold information must submit written reasons why claimed exception applies).

We note that Attachment E contains draft versions of some policymaking documents. You have not informed us whether final versions of these documents have been or will be released. If final versions have been or will be released, the draft versions indicate policymaking decisions and may be withheld under section 552.111; however, any severable factual information contained in the drafts but not included in the final versions must be released. If final versions of the marked policymaking documents were not released or are not intended for release, the drafts themselves must be released. The drafts we have not marked do not implicate the TNRCC's policymaking functions and therefore may not be withheld under section 552.111. *See* ORD 559 at 2 (agency may not except documents from disclosure merely by stamping word "draft" on them).

In addition, we note that Attachment E contains information that must be withheld under section 552.137 of the Government Code. Section 552.137 provides in relevant part:

- (a) An e-mail address of *a member of the public* that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release. [Emphasis added.]

Section 552.137 requires TNRCC to withhold e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the members of the public have affirmatively consented to their release. There is no indication that the members of the public whose e-mail addresses are at issue have consented

to release of these addresses. Accordingly, we have marked a sample of the email addresses in Attachment E that TNRCC must withhold from disclosure pursuant to section 552.137 of the Government Code.

Finally, Attachment E also contains account numbers that are subject to section 552.136 of the Government Code. Section 552.136 makes certain access device numbers confidential and provides in pertinent part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value;

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked examples of the type of account numbers that TNRCC must withhold pursuant to section 552.136 of the Government Code.

In summary, TNRCC may not withhold any portion of Attachment E as audit working papers. Attachment C may be withheld in its entirety. TNRCC may also withhold the internal communications that we have marked in Attachments D and E. However, the marked draft documents in Attachment E may be withheld only upon a factual determination that final versions of the documents have been or will be released. Finally, e-mail addresses and account numbers like those that we have marked in Attachment E must be withheld. All other information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

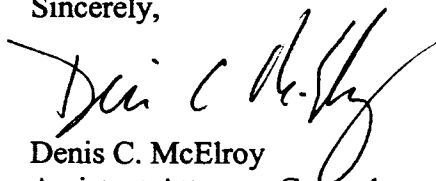
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.-Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 161742

Enc. Marked documents

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